

The Prosecutor and Pre-Trial Chambers lock horns over the Comoros case – again

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By: James Hendry

On September 16, 2020, the Pre-Trial Chamber (PTC) of the International Criminal Court (ICC) released its decision on a judicial review application made by the Union of the Comoros of the Prosecutor's second reconsideration of her decision not to investigate the referral of the May 31, 2010 Israeli Defence Force (IDF) raid on the Humanitarian Aid Flotilla bound for the Gaza strip. This Journal reported on the Appeals Chamber's decision on an appeal from the second order of the Pre-Trial Chamber (PTC) to the Prosecutor to reconsider her decision not to proceed at https://globaljustice.queenslaw.ca/news/comoros-referral-the-appeals-chamber-of-the-international-

criminal-court-gives-guidance-to-the-prosecutor. The Prosecutor reconsidered her decision after the Appeals Chamber provided further guidance. But she came to the same view: that no potential case arising from the situation would be sufficiently grave to require further action by the ICC. The Comoros again applied to the PTC for judicial review which is the subject of this article. Though the PTC found errors of law, it decided not to order another reconsideration. It simply did not know how far it could properly press the Prosecutor to apply its interpretation of the law to the evidence the Prosecutor had in hand when she made her original decision about prosecution.

To recapitulate briefly, the Prosecutor originally determined on November 6, 2014 that there was a reasonable basis to believe that the war crimes of wilful killing and wilful causing serous injury and outrages on personal dignity had been committed by members of the IDF during the takeover of the Mavi Marmara in the flotilla bound for Gaza. However, she decided that the potential criminal cases arising from the situation would not be of sufficient gravity to proceed with an investigation and therefore inadmissible pursuant to article 17(1)(d) of the Rome Statute. At the request of the Comoros, the PTC reviewed the original 2014 decision and in its "Reconsideration Decision" of July 16, 2015, ordered her to reconsider it. On November 29, 2017, the Prosecutor filed her reconsideration but maintained her position not to proceed based on insufficient gravity. Again, the Comoros sought a review and on November 15, 2018, the PTC ordered her to reconsider her decision saying she had not complied with the Reconsideration Decision. This time, the Prosecutor appealed the PTC decision to the Appeals Chamber which held on September 2, 2019 that some of the directions by the PTC in the Reconsideration Decision had been inappropriate. It ordered the Prosecutor to reconsider again based on the Reconsideration Decision of the PTC as modified by the Appeals Chamber. In her December 2, 2019 reconsideration, the Prosecutor maintained her refusal to proceed based on insufficiency of gravity. On March 2, 2020, the Comoros again sought a review of the Prosecutor's refusal to proceed. The following examines the issues.

The power to review

The Prosecutor decides whether to investigate a case pursuant to article 53(1) which reads:

"The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

(b) The case is or would be admissible under article 17; and

(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber."

Article 17(1(d) on the issue of admissibility reads: "(d) The case is not of sufficient gravity to justify further action by the Court".

The PTC has power to review a decision of the Prosecutor pursuant to article 53(3)(a).

The legal framework of the review of a decision not to proceed

The PTC set the stage for its review of the Prosecutor's December 2019 decision by setting out the legal framework for its review:

- The PTC emphasized the imperative nature of article 53(1) which requires that the Prosecutor shall initiate an investigation unless she determines there is no basis to proceed. The PTC emphasized that though the Prosecutor ultimately decides whether to proceed, she must consider article 53(1)(a) to (c) which are 'exacting legal requirements.'
- The PTC observed that a "reasonable basis to believe" was the lowest legal standard in the Statute. This suggested that the Prosecutor's decision to investigate should not be confined to cases where the information she had was clear. Rather, the purpose of an investigation was to properly clarify the facts where they had several plausible interpretations.
- The PTC noted that the purpose of the gravity requirement in article 17(1)(d) is meant to exclude marginal cases that would otherwise be within the Court's jurisdiction (para. 22). In assessing gravity, the Prosecutor should consider whether the persons who would be investigated for crimes within the court's jurisdiction in the potential cases arising from the situation are those who might bear the greatest responsibility (paras. 18-9). The PTC noted that its caselaw requires a holistic evaluation of both quantitative and qualitative criteria in assessing gravity. The PTC has considered (a) the scale of the alleged crimes (number of victims, geographical area, the intensity and duration of the crimes) (b) the nature of the crimes (their legal characterization and violation of human rights) (c) the manner of the commission of the crimes (means, cruelty, discriminatory motives, the victims' vulnerability and whether they were part of a plan or policy) and (d) the impact of the crimes (immediate and long term harm to victims and their families, amount of damage)(paras. 16-22).
- The PTC summarized its powers as defined by the Appeals Chamber: (a) the Prosecutor was bound to apply the PTC's interpretations of law (b) the PTC could direct the Prosecutor to consider certain information, but not how to evaluate it, nor what factual findings must be made nor how to apply the law to the facts (c) on assessing gravity, the PTC could direct the Prosecutor to consider specific factors, but not what weight to assign to them or the result that must be reached and (d) the PTC could not direct the Prosecutor about her ultimate decision to prosecute (para. 23).
- The PTC has the power to review the reconsideration as a logical extension of its power in article 53(3)(a) to request a reconsideration. The same logic requires that it must be a thorough genuine reconsideration that shows how she addressed the directions of the PTC (para. 25).

The PTC held that the Prosecutor was required to reconsider her decision only on the basis of the information she had at the time of her first decision not to proceed (November 2014) (para. 37).

The issues under review

Persons likely to be the focus of investigation

In the first judicial review the PTC held that the Prosecutor had failed to assess the gravity issue because she had not considered whether the persons likely to be the object of the investigation would include those most responsible. In the December decision under review, the Prosecutor decided that the persons with greatest responsibility were the direct perpetrators of the alleged crimes which would yield potential cases of limited scope and which would cause problems of identification of the perpetrators because of the chaos of the attack.

The PTC found three new errors.

The first was that the Prosecutor should have considered only that the likely objects of investigation were those who might bear the greatest responsibility. She erred in considering what she thought to be the limited scope of the potential cases (paras. 39, 45).

The Prosecutor further erred by saying that the direct perpetrators would be the focus of her investigation as the most responsible while prematurely excluding their immediate commanders, senior IDF commanders and Israeli leaders from the category of potential cases of those who might be liable as superiors or accessories, because the limited information she had did not suggest that these others made sufficient contribution to the crimes or had the necessary intent. The PTC held that categories of individuals who were likely to be investigated should not be excluded at this early admissibility phase. The PTC also emphasized that the reasonable basis to believe standard is not meant to determine who will be ‘necessarily’ or ‘undoubtedly’ be found liable when all the evidence is available when the investigation is finished. It is sufficient if the information at hand points to ‘reasonable and sensible’ conclusions as long as one of the conclusions is that a crime within the jurisdiction of the Court has been committed (para. 43).

The Prosecutor also erred by considering the difficulty of identifying the alleged perpetrators. The PTC held this was irrelevant to determining gravity or whether to proceed (para. 44).

The result was that the PTC held that the Prosecutor had not genuinely reconsidered her decision (para. 45).

Scale of the crimes

The PTC rejected the Comoros’ argument that the Prosecutor had failed to give sufficient consideration to the scale of the crimes. She had maintained her position that the scale of the crimes was relatively limited. The PTC had earlier directed the Prosecutor to take this factor into account in

assessing gravity, effectively instructing her to give it specific weight. However, the Appeals Chamber had held this direction to be inappropriate and so did not bind the Prosecutor (para. 50).

Nature of the alleged crimes

The PTC had earlier found that the Prosecutor had erred in her first decision in assessing that the mistreatment inflicted on passengers of the Mavi Marmara did not constitute the war crimes of torture or inhumane treatment, but only outrages to personal dignity. The PTC's reasoning was that her assessment of the crimes was premature on the limited information at hand about pain and suffering, that there was a reasonable basis to proceed because the conduct might be later found to amount to torture and inhumane treatment, and that the legal characterization of the crimes was important in assessing the gravity of the potential cases that might arise (para. 51, Reconsideration Decision, para. 28). The Prosecutor maintained her position in her reconsideration.

In considering the question about whether the Prosecutor was bound to follow its decision, the PTC admitted that the Appeals Chamber had held that the PTC had erred to the extent that it could be seen to have obliged the Prosecutor to conclude there was torture and inhumane treatment because it was for the Prosecutor to make factual findings and apply the law to the facts. But the Appeals Chamber had also stated that the Prosecutor had to apply the PTC's interpretation of the reasonable basis to believe standard and to consider factors or information relating to gravity of potential cases, including the mistreatment of the passengers and the legal characterization of the crimes involved.

Once again, the PTC held that the Prosecutor had failed to genuinely reconsider her decision.

First, the Prosecutor did not follow the reasonable basis to believe standard when she found the evidence inconclusive about whether the mistreatment of passengers was due to intentional or unintentional acts. She erroneously made her decision based on this lack of clarity when she should have opened an investigation to properly assess any plausible explanations supporting characterization of the mistreatment as torture or inhumane treatment (para. 61).

Second, the Prosecutor failed to consider the characterization of the crimes in the gravity assessment but instead improperly considered only the underlying facts. The PTC noted that the Appeals Chamber has held that the legal characterization of the crimes is relevant because each crime represents a distinct value of the international community that has been violated. The PTC held that the Prosecutor's focus on underlying facts rather than the legal characterization of the crimes showed that she had accorded neutral weight to their legal characterization, effectively failing to take this factor into account in assessing gravity (paras. 64, 66).

Third, the Prosecutor prematurely assessed the extent and nature of victimization and, that in assessing the weight of the nature of the crimes noted that the passengers were subjected to various forms of mistreatment and that each potential case had to be considered separately. The PTC held that considering individual impacts prematurely left out important factors in assessing in context, the type of mistreatment and the personal circumstances of the victims, such as their medical condition

and vulnerability.

Fourth, the Prosecutor also erroneously considered the status of victims, such as their rights as non-combatants under the Geneva Conventions, as well as criminal responsibility of the perpetrators, such as reliance on self-defence, when she considered the nature of the crimes as a matter of gravity. The question of status is relevant to whether a crime was committed under article 53(1)(a), but this was a question the Prosecutor had already decided in her original decision not to proceed. She should not have relied on uncertainties to assign less weight to the nature of the crimes.

Once again, the PTC held that the Prosecutor had not genuinely reconsidered her decision.

The repetition that the defects of the Prosecutor's decision failed to show that it was a "genuine reconsideration" suggests that the PTC was attempting to establish a standard for reconsideration that was properly founded on the PTC's interpretation of article 53(1).

The issue of the impact of the alleged crimes

The Prosecutor's original decision not to proceed was based on her finding that, though the crimes had a significant impact on the victims and their families, there was not a significant impact on the people of Gaza where the flotilla was headed. The PTC had held in its Reconsideration Decision that the impact on the victims themselves indicated significant gravity and that she should have considered that the crimes had an impact beyond the direct and indirect victims in sending a message to the people of Gaza that Israel was in charge of humanitarian aid. The Prosecutor in her 2019 reconsideration under review submitted that the impact on the victims was small, that it was too hard to assess their effect on Gaza and, further, that other nations had refused to prosecute the crimes in issue showing that the alleged crimes had insufficient gravity to proceed.

Once again, the PTC concluded that the Prosecutor had not *genuinely* reconsidered her decision.

The Prosecutor failed take direction from the PTC to consider the impact of the crimes on the people of Gaza and the international concerns raised by the attack. However, the PTC admitted that the Appeal Chamber's reasoning made it clear that the Prosecutor was not bound to follow the PTC direction to find that the impact of the crimes on the victims indicated significant gravity.

First, the Prosecutor erred by not showing how she took the information about international furor triggered by the Comoros incident into consideration. The PTC held that she was obliged to show how she assessed this information and to demonstrate to the PTC that she did. Her failure to do this led the PTC to conclude that she had not assigned it any weight in assessing gravity (para. 78).

Second, the Prosecutor erred by not considering the impact of the alleged crimes on the victims. The Prosecutor argued that the impact on victims was closely related to the scale of the crimes, leading to limited additional gravity. The PTC separated the two factors: scale referred to numbers of victims, the geographical and time span and the intensity of the crimes; impact related to the damage of any sort

inflicted on the victims (para. 79). Though the Prosecutor said she considered the harm suffered by the victims, there was no indication of this on the record so the PTC concluded she did not consider it (para. 79).

Third, the Prosecutor erred in considering the fact that no national authorities were investigating the events in the gravity assessment. This matter was relevant only in respect of complementarity under article 17(1)(a)-(c). And this was a matter for the Prosecutor to assess herself rather than relying on the decisions of other national prosecutors (para. 83).

Manner of commission of the crimes

The Prosecutor had earlier decided not to proceed because her information did not suggest that the crimes were systemic or resulted from a plan or policy. The PTC originally decided that this was wrong because: she had not inferred from the shooting at the ship by IDC members that there was premeditation, that the systematic abuse of passengers after arriving in Israel showed sanctioning of the crimes, that the passengers of the Mavi Marmara were treated with excessive cruelty, and that the IDF attempted to conceal the crimes and the absence of crimes on the other flotilla vessels all of which suggested planning. On reconsideration, the Prosecutor accepted there may have been a plan, but it was localized to the IDF troops in the attack on the Mari Marmara.

Once again, the PTC held the Prosecutor had not genuinely reconsidered her decision. The Prosecutor had failed to apply the reasonable grounds to believe standard. Basically, the PTC decided that the directions to consider information it had made were consistent with both a plan or policy and as were the individual excesses of the IDF operatives. The PTC was of the view that where there were plausible explanations, the Prosecutor was bound to open an investigation. The PTC went on to qualify this as requiring her to apply the reasonable grounds to believe standard, though she was not bound of course to reach particular findings or conclusions at the PTC’s direction.

Overall assessment of gravity

The PTC also took the Prosecutor to task for her interpretation of the gravity requirement. It wrote that the Prosecutor saw it as a selective tool to ensure the Court did not have to deal with every case. However, the PTC reiterated that the real purpose of the gravity assessment was to ensure the court does not prosecute cases of marginal gravity and is an exclusionary principle (para. 96). It is the gravity of potential cases that might arise from a situation that is important, even if there is only one, not the gravity of the whole situation that is in issue (para. 97).

The PTC asserted that the gravity principle should be applied consistently across all situations referred to the Court (para. 98).

In conclusion, the PTC reviewed the Prosecutors errors discussed above and concluded that there was no *genuine* reconsideration. It was of the view that the reasonable basis to believe standard was at the heart of the dispute (para. 103). It noted that she continued to use the lack of clarity in the

information and the existence of several plausible explanations to explain why she gave low weight to factors in her gravity assessment. The PTC reiterated that this had continued, contrary to its determination of the interpretation of the reasonable basis to believe standard.

The PTC decided not to direct the Prosecutor to reconsider her decision even in the face of the errors it found. The PTC said that it was not clear about the extent it could force the Prosecutor to correct errors related to questions of law and the application of the law to the facts. The PTC wondered whether it could direct the Prosecutor to stop relying on the lack of clarity and existence of plausible explanations in making a finding of fact relevant to gravity. It was also unclear to the PTC to what extent it might correct the Prosecutor's errors related to her assessing factors relevant to the gravity issue. The ability to assess the weight that the Prosecutor attaches to information is central to ensuring a genuine reconsideration. The PTC said that the current state of law does not establish the 'prerogatives' between the Prosecutor and PTC. The PTC said that Prosecutor's interpretation of the Appeals Chamber's decision in this case had negated the effectiveness of the article 53(3)(a) procedure both as to interpretation of the law and as to what factors or information should be taken into account (paras. 106-112).

Conclusion

The PTC shows considerable frustration in this case. It tries to give the principles established for the Prosecutor's reconsidering a decision not to proceed with a situation a strict construction. It invented a concept of a 'genuine reconsideration' to designate a reconsideration that has been carried out according to these strict principles. It found that the Prosecutor had breached some of these principles in its earlier reconsiderations and had committed new errors in the one before it. However, even with these errors, the PTC declined to request another reconsideration on the grounds that the Appeals Chamber had not made it clear just how it much force it could use to make the Prosecutor to apply the principles to the facts. Thus, it has left the difficult question of the balance between the court's role of determining the law applying in a reconsideration and the Prosecutor's role in ensuring that it is applied to the facts. A clearer bid for Appellate intervention probably does not exist.

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